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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

INGERSOLL-RAND COMPANY and ROBERT H. POTT, HOLSCLAW BROTHERS, INC. and CHARLES H. HOLSCLAW, Trustee,

Petitioners,

vs.

BLACK & DECKER MANUFACTURING COMPANY,

Respondent.

No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Ingersoll-Rand Company, Robert H. Pott, Holsclaw Brothers, Inc. and Charles H. Holsclaw, Trustee, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above entitled case.

A certified transcript of the record, including the proceedings in said Court of Appeals, is furnished herewith in compliance with Rule 38 of the rules of this Court.

Summary Statement of the Matter Involved

This is a suit for infringement of the Pott patent 2,012,916, granted August 27, 1935 upon application filed January 30, 1932 (PA 161).* The district court, in Baltimore, Maryland, decided that the patent was invalid, for want of patentable invention, and that it was not infringed, 94 F. Supp. 938 (PA 3, 23, 24). The Court of Appeals for the Fourth Circuit on November 5, 1951 affirmed on the same ground of invalidity, without deciding infringement, 4 Cir., 192 F. 2d 270 (R 255). A petition for rehearing as to validity was duly filed on December 5, 1951, but was denied December 27, 1951, *one judge dissenting* (R 268).

This Court is asked to take the cause to decide the question of patentable invention, under the standards announced and applied by this Court, and which we believe to have been misapplied by the courts below.

Jurisdiction

The jurisdiction of the Court is invoked under Section 240(a) of the Judicial Code as amended June 25, 1948, effective September 1, 1948 (28 U. S. C., Section 1254(1)) and under Section 5(b1) of Rule 38 of this Court.

The pertinent patent statute is 35 U. S. C. 31; R. S. 4886, set forth in an appendix hereto.

Question Presented and Specification of Errors

Does the Pott invention, being that of an individual, independent inventor, and producing a new result according

*PA is Appellants' Appendix.

to a new principle of operation, resulting in a tool admittedly "new" and "amazing", the use of which greatly improved conditions of labor, and against which the only prior art held to negative invention was three patents, no one of them disclosing Pott's novel principle of operation or new result, and none shown to have advanced or even contributed to this art, meet the standards of invention as now set by this Court?

The error into which the courts below fell, complained of here, is their failure to sustain as valid, against the defense of non-patentable invention, a patent which this Court would so sustain and which plainly meets the highest standards of invention set by this Court.

Reasons for the Allowance of the Writ

No other case involving this patent has been tried, and therefore there is no conflict of decisions concerning its validity or infringement.

Although the courts below concurred in their veiws concerning the validity of the Pott patent, that does not prevent this Court from correcting the decisions below, if erroneous, *Great A. & P. Tea Co.* v. *Supermarket,* 340 U. S. 147, and *Crest Specialty* v. *Trager,* 341 U. S. 912.

The grounds for certiorari are that the views of the courts below, that the patent did not embody "patentable invention" as established by the recent opinions of this Court, including the *Great A. & P. Tea* case, *supra,* were incorrect; that the plain intent of this Court's decision in the *Great A. & P. case* has been and is being misinterpreted and misapplied by lower courts and has caused much uncertainty and confusion concerning the extent, if any, to

which it changed the law as to what constitutes invention*; and that the importance, to the bench and bar, of this Court now making a clarifying application, for which the present is an appropriate case, of the principles which this Court has, for over a century, declared to be applicable to patents, far transcends the matters and parties here involved, because of the great *public interest* in having a clear understanding of the law of patents as it now stands. Particularly, recent decisions seem to have created confusion as to *all* patents, because almost every patent has claims which, upon analysis, may be taken as combinations of elements, be they all old or some old and some new. *The Great A. & P. Tea case* has been cited by lower courts as though "combination claims" were in some special class, offensive because of their form and, therefore, to be viewed with especial suspicion. Yet the form is, in fact, that which is most widely prevalent in patents and few, indeed, are the inventions susceptible of being adequately claimed in any other form.

The granting of patents to encourage the making and disclosing of inventions is the policy and practice of the United States. Thousands of patents each year are issued by the Government under its seal, with the unqualified statement on the patent that "upon due examination made the said claimant is adjudged to be justly entitled to a patent under the Law." There should be no doubt that this Court, the final interpreter of the federal statutes, will sustain combination patents when they have inventive merit, correcting erroneous decisions below when necessary or advisable.

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*E.g., *McCord Corporation* v. *Beacon Auto Radiator, Inc.*, 1 Cir., decided January 31, 1952, 92 U. S. P. Q. 163 at pp. 165-167 (not yet officially reported).

BRIEF

The controlling facts are undisputed. The question is one of law only, as the Pott patent was invalidated, despite its novelty, utility, great success and extensive use, because of three prior patents which are in the record and whose simple mechanical structures are easily understood. The differences between the parties are as to what are the proper legal inferences from the facts.

The Pott patent discloses and claims an "impact" tool for first running down and then tightening a nut on a bolt by combining two *different* and *successive* modes of operation, each under its appropriate condition—first, with the parts of the tool clutched together, in which condition all hammering and impact is absent and the nut is simply run down to its seat by *continuous* rotation; second, after the nut is seated and so offers resistance, the clutching ceases and one part of the tool hammers the other part with *intermittent* rotary impact to tighten the nut by a succession of *rotary* impact blows (claim 3; opinion of the Court of Appeals, R 257). Transition from the first to the second mode of operation is *automatic* and automatically occurs *at the proper time.*

Prior to Pott, so-called "torque" wrenches were used to twist nuts, bolts and the like, either to tighten or to loosen. Electric or air power was often employed, to hasten the process, but the man handling the wrench had to absorb in his own body all the torque (twisting force) required for the work. Thus, if the torque required was 100 foot pounds, the 100 foot pound resistance from the nut to the wrench had to be absorbed by the arms, body and legs of the man holding the wrench. This was particularly serious when the shock was sudden, as when the nut's resistance

suddenly changed from practically zero, during the preliminary free running down of the nut, to a maximum after the nut was seated. Not only was the fatigue great, so that "in the automotive industry it created *quite a labor turnover,* on account of the strain on the operator's hands" (Pott, PA 96), but when working on high bridges and scaffolding, the sudden shock was often dangerous.

Because of these troubles, many attempts were made, over a long period of years, to improve the old "torque" wrenches, including patents taken out by respondent and others. For example, the Levedahl patent 1,684,633, relied upon by respondent, says that the vibration of "torque" wrenches "is suddenly thrown against the body and arms of the operator holding the tool against the work, the operation of the tool becomes *exceedingly burdensome and tiring",* and "in these tools this force is so strong that it tends to turn the entire tool out of the grasp of the operator" (PA 198).

The Pott "impact wrench" operates upon an entirely new principle, different from that of the prior "torque" wrench, in that while it acts like a "torque" wrench during the preliminary easy running down of the nut by the usual twisting action, when the resistance to turning (torque) suddenly increases upon seating of the nut, this action automatically changes to a series of *very rapid hammer blows,* delivered in a rotary or tangential direction, each of small torque accumulated in a spring but redelivered with tremendous cumulative effect, to tighten the nut to its final position.

An operator subjected to a torque of 150 foot pounds in tightening a nut when using a "torque" wrench, will have to withstand only 6 to 10 foot pounds with an "impact" wrench.

An "impact" wrench one-third the size of a "torque" wrench will tighten a nut better, will reduce by 85% the fatigue of the operator and will be safer to operate (Reynolds, PA 46, 49-52, 71-72). These facts are not contradicted. There is no dispute that before Pott there was in use no tool which operated automatically to rotate a nut *by continuous twisting* and automatically to rotate the same nut *by hammering* when the resistance increases, with automatic *transition* from the first to the second mode of operation, *at the proper time*. The patents relied upon by the courts below to invalidate the Pott patent were not intended to do, and in fact could not do, what the Pott tool admittedly accomplishes.

Respondent since at least 1921 had been making and selling many varieties of "torque" wrenches, some of which were patented (PA 126). After the Pott "impact" wrench came on the market, respondent's salesmen called respondent's attention to it as "possibly an item we should add to our line" because, so respondent's research engineer admitted, "They were afraid of not increasing their sales and commissions" (Ramey, PA 129). Respondent then, in 1949, after more than a quarter of a century of making and selling "torque" wrenches, commenced to sell "impact" wrenches, advertising in March, 1949, its new product as an "*Amazing, New* ⅜"* Electric Impact Wrench", including the following typical "impact" operation advantages, viz.:

> "1. The POSITIVE, sure-fire way to remove frozen, rusty bolts or nuts—FAST!
>
> "2. Delivers 2000 blows per minute to hammer fasteners loose or drive them home—IN A FEW SECONDS! (Free running speed: 1600 r.p.m.)

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*Italics ours.

"3. Weighs only 8¼ lbs., yet has DRIVING CAPACITY of coventional nut runner weighing almost 30 lbs.!

"4. Operator fatigue reduced to an *amazing** minimum . . .

NO { jarring / twisting / fighting the Wrench!

"5. So well-balanced, operator can control wrench by holding it lightly, with one hand!" (plffs. ex. 14; PA 170).

Respondent's 1949 catalogue stated, correctly (PA 173):

> "The Black & Decker Electric Impact Wrench is *a completely new unit** for rapid tightening and removal of nuts, bolts and cap screws. In tightening operations, the wrench spins *a free-running fastener** to a seating position by high speed direct drive; immediately the clutch throws into operation a rapid, positive *hammering** action which tightens the fastener into thousands of quick, sharp blows per minute. Just a few seconds of this positive impacting is all that is needed for maximum tightness. And there is *practically no torque reaction to the operator**—no uncomfortable jarring or twisting—no fighting the Wrench to get results."**

There is no dispute concerning the great value to industry of the "impact" wrench, the Court of Appeals saying "Of the *practical utility** of such a tool, there can be

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*Italics ours.

**This is an excellent description of the Pott "impact" wrench, which first spins the nut and then automatically hammers, unlike the prior "torque" wrenches and the Scanlon, Nielsen and Weibull prior art patents relied upon by respondent.

*no question**" (R 258). Nor is there any dispute that Pott was the first to make, sell and patent this tool.

Pott is a perfect example of the *individual, independent* inventor for whose protection the patent laws are indisputably intended. He was an independent mechanic out of a job during the depression year of 1930 and living in Evansville, Indiana, when he invented the "impact wrench", and with the aid of the Holsclaws, who had a small shop in Evansville, sold several of his wrenches to automobile manufacturers, where it was successfully used (Pott, PA 102). In 1934 Pott and the Holsclaws made a patent license contract with Ingersoll-Rand, under which it manufactured "impact wrenches", paying Pott and the Holsclaws up to the time of trial about three million dollars in royalties. As above stated, respondent in 1949 added what it then said was the "amazing" and "new" "impact" wrench to its old line of products, and this suit was promptly brought.

The Pott Patent Has Patentable Invention by the Highest Standards of this Court.

The question of invention in the Pott patent depends upon the inferences to be drawn from the prior patents to Scanlon 1,671,489 (PA 236), Nielsen 1,770,656 (PA 231) and Weibull 1,776,057 (PA 241), which the courts below decided negatived "patentable invention" in Pott. Although the tools of those patents were different from Pott's, and could not without complete change do what Pott's tool does, it seemed to the courts below that, despite Pott's contribution to the public of a novel and admittedly highly useful tool, he was not an "inventor" by the standards declared by this Court. Here, we think, was obvious error.

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*Italics ours.

The case for invention in the Pott patent is far stronger than that for the McFeely patent sustained by this Court in *Williams Co.* v. *Shoe Mach. Co.*, 316 U. S. 364, and also meets the tests specified in the dissenting opinion, per Mr. Justice Black. The McFeely patent was for a shoe machine invented by an employee of the United Shoe Machinery Company to improve an earlier shoe machine, by enabling it to work on shoes of different sizes. In that case the inventor was an employee of, and had the facilities of, a large company, there was no new result performed by the machine, which clamped the heel, positioned it, wiped and lasted as in prior machines, and the dissenting opinion declared (p. 384) that "the improvements here were but duplications of old elements to obtain an old result . . ." But in the present case, Pott, *an independent inventor*, did *not* merely "obtain an old result" by the mechanisms of his wrench, because it, for the first time, performed a *new* twisting-hammering operation on nuts and bolts, with greatly reduced fatigue and danger to the workman. His wrench was *not* the usual small and expected technological advance in the mechanical arts, because power wrenches had been known and used for at least a quarter of a century before Pott, and their defects had long been recognized. Pott did not merely improve the old power wrench; he created a *new tool*, operating on *a new and different principle*,—the "impact" wrench. He made an invention by the standards of the *Williams* case opinions.

And the patent in the *Great A. & P. Tea* case was very different from, and much weaker than, the Pott patent. There, the patent was for the combination of an old cashier's counter and its extension with an old three sided frame, each made and used exactly as before, the alleged inventive idea being merely to put together the two old things, without

any change in either the elements or their result. This Court held (p. 152) the patent bad, saying:

> "The conjunction or concert of known elements must contribute something; only when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable".

Pott made a new tool, operating differently from any prior device. His tool *does* do more than "the sum of its parts", and mere addition of things from prior patents would *not* make a Pott tool. To make an "impact" wrench from Scanlon, Nielsen or Weibull would require not merely radical, but complete, changes in both the purposes and the structures of those patents, and in their modes of operation.

Scanlon is for use in drilling an oil well. He proposes to apply a sharp jar to a section of frozen pipe, by twisting a long drill pipe, untwisting to cause a jar, lifting the drill pipe to again twist it, and so forth in a step by step process. There is, and could be, no continuous rotation before jarring and no continuing series of jars. There is not a single mechanical part in Scanlon which could be used in Pott, even with modifications for Pott purposes.

Nielsen has a hammer with an elastic shaft, which rotates to drive downward a drill, by repeated impacts, like a man using a sledge hammer to drive a stake into the ground. There is no twisting (torque) of any kind.

Weibull, found by the court below to be the closest prior art (opinion of the Court of Appeals, R 259), *always* has impacting action under *all* operating conditions. Judge Chesnut in the district court found that Weibull has "axially directed *impact* force" and "rotary *impact* force" (Finding 16, PA 33) and always possesses these two *impact* components (k_a and k_t), in varying amounts (*ibid.*). Whether

Weibull is used for axial hammering action (utilizing component k_a) or for rotary hammering action (utilizing component k_t), Weibull *always* has these "impulses" or series of impacts, as he himself describes (PA 246). Dr. Hoppmann, for respondent, commenced his description of Weibull by admitting: "I think we might say at the outset that *the Weibull tool is strictly an impacting tool*" (DA* 144, our emphasis).

The holding of invalidity by the court below was on the ground that the claims "are invalid for *lack of invention* in the light of the prior art" (opinion of the Court of Appeals, R 257). A holding of lack of invention necessarily concedes, as Judge Chesnut seems also to have done, that Pott is not *anticipated* by Weibull,—hence that Pott *does* have *something* more than Weibull discloses. We most respectfully and with all deference urge that that "something" is a *new principle* of operation. This comprises two *different* and *successive* modes of operation under the respective *different* conditions appropriate to each, and with *automatic* transition from one mode to the other, *at the proper time.* These two modes are, first, a *continuous,* non-hammering operation for rundown and, thereafter, second, an *intermittent* rotary impact hammering operation for tightening against resistance, the transition from the former to the latter being accomplished *automatically* when the nut meets resistance. *Weibull's* teaching is directly contrary to this mode of operation (Weibull U. S. pat., 1,776,057, p. 3, ll. 110, 114; PA 243). Neither the initial *continuous* mode of operation nor, a *fortiori,* the automatic transition to the second mode, is taught by Weibull.

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*DA is Appellee's Appendix.

None of these prior patents was for a tool which would continuously rotate and automatically shift to hammering, and none could do so without radical changes amounting to invention.

After Pott devised his highly useful tool, which, being mechanical, necessarily must operate in accordance with mechanical laws, it is, of course, possible to find in prior patents examples of the use of isolated parts of the same laws, in different forms and for different purposes. But to combine those principles, in different forms and in a new way, to accomplish a new and beneficial result, never attained before, by creating a tool of great merit and undoubted utility, characterized even by respondent as "new" and "amazing", and as benefitting labor, is the very essence of "patentable invention" of the precise kind which the patent laws are intended to protect, meeting the *highest* standards set by this Court.

The Pott patent was infringed.

The trial court decided that respondent's "impact" wrench did not infringe the Pott patent (PA 24), the Court of Appeals not passing on this question (R 263). This Court, if certiorari be granted, may wish to remand the cause to the Court of Appeals for decision on infringement.

Respondent's accused device is admittedly an "impact" wrench, operating to continuously rotate until the resistance to turning increases, and then automatically hammering. As might be expected, respondent's 1949 wrench differs in some respects from the 1930 Pott wrench, as do 1949 automobiles, engine driven planes etc. from their 1930 models. The principal difference is that Pott has one set of teeth, which both rotate the nut, and then hammer, while respondent's wrench has two sets of teeth, each performing a dif-

ferent one of the two functions performed by the Pott single set. There are other differences, perhaps "to introduce minor variations to conceal and shelter the piracy", *Graver* v. *Linde,* 339 U. S. 605, 607, but nothing which affects its operation as an "impact" wrench. And although respondent has patented its own wrench, "It is well established that an improver can not appropriate the basic patent of another and that the the improver without a license is an infringer and may be sued as such", *Temco* v. *Apco,* 275 U. S. 319, 328.

Conclusion

The courts below were in plain error in deciding that there was no "patentable invention", as defined by this Court, and in holding invalid a patent which this Court would sustain according to its announced standards. Because of the public interest in clarifying the status of "combination" patents, the petition for writ of certiorari should be granted.

Respectfully submitted,

FRANK B. OBER,
Attorney for Petitioners,
630 Mathieson Building,
Baltimore 2, Maryland.

STEPHEN H. PHILBIN,
CHESTER A. ADEE,
C. BLAKE TOWNSEND,
Of Counsel for Petitioners.

February, 1952.

APPENDIX

35 U. S. C. 31; R. S. 4886. *Inventions patentable.*

Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or *any new and useful improvements thereof,* * * * not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor. (R. S. sec. 4886; Mar. 3, 1897, ch. 391, sec. 1, 29 Stat. 692; May 23, 1930, ch. 312, sec. 1, 46 Stat. 376; Aug. 5, 1939, ch. 450, sec. 1, 53 Stat. 1212). (Emphasis supplied).

MAR 21 1952
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

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No. 587.

INGERSOLL-RAND COMPANY AND ROBERT H. POTT, HOLSCLAW BROTHERS, INC. AND CHARLES H. HOLSCLAW, TRUSTEE,

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Respondent.

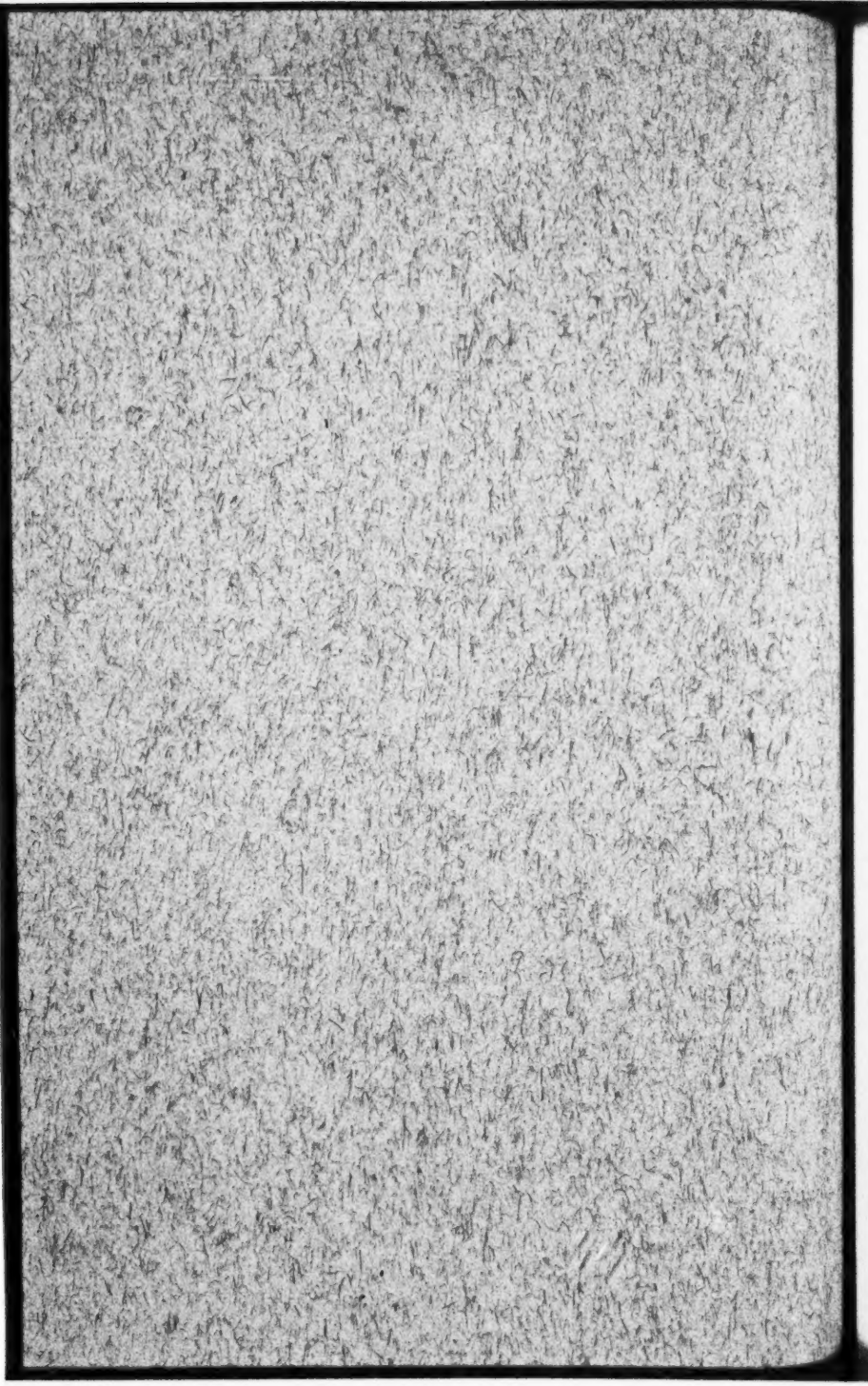
RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF PETITION FOR A WRIT OF CERTIORARI.

THOMAS W. Y. CLARK,
Keyser Building,
Baltimore 2, Maryland,
Attorney for Respondent.

ALBERT R. GOLDICK,
Of Counsel for Respondent.

March, 1952.

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

OPINIONS BELOW AND QUESTION PRESENTED.

The case is an ordinary one where a patentee and his licensee endeavor to prevent competition by a suit for an injunction against the manufacture and sale of an automatic nut runner tool, and for damages. The basis for the claim is the allegation of infringement of United States Letters Patent 2,012,916 issued to the petitioner, Robert H. Pott, on an "Impact Tool," which discloses an impacting mechanism adapted to the running down of a threaded nut on a bolt and thereafter the tightening of the seated nut in automatic sequence.

The courts below found no unusual questions presented. The trial court stated—"This is the usual type of

patent case and the defenses are the usual ones of invalidity of the patent and non-infringement." (* PA 3.) The appeals court stated, "This is a typical suit for patent infringement." (R. 255).

The courts below decided the patent claims in suit were invalid as being anticipated by the disclosures of prior art impacting mechanism patents on tools not cited by the Patent Office at the time the Pott impact tool patent was being solicited, and which show the operating principles and combination of impacting elements disclosed and broadly claimed by the Pott patent. The lower courts held that the thought of using such prior impacting mechanisms as impacting nut runners did not constitute invention; the appeals court citing *Knapp vs. Morss,* 150 U. S. 221, 227, 228 and *Consolidated Roller Mill Co. vs. Walker,* 138 U. S. 124, 132. (R. 262.)

The courts below further found that the claims placed in suit by petitioners were so vague, indefinite, and functional as to fail to be "consistent with the clarity required of claims which define the boundaries of patent monopoly. 38 Stat. 958, 35 U. S. C. Sec. 33." ** (Trial Court's Op. PA 13 and Court of Appeals Opinion (R. 257) and Findings 21, PA 37.)

There is no conflict to be found between the opinions of the two courts below nor is there to be found in them support for the formulation of a question of "great public interest" (Petitioners' Br. p. 4).† The public interest has been well served by the concurrent decisions of the lower courts which eliminated a broad barrier to the public of the use of prior art mechanical impacting prin-

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* (PA is Appellant's Appendix.)

** Printed at end of this brief.

† Petitioners' Brief hereinafter designated Br.

ciples and mechanisms. These decisions were right and should not be disturbed.

Keller vs. Adams-Campbell Co., 264 U. S. 314, 319.

> "Such an ordinary patent case, with the usual issues of invention, breadth of claims, and noninfringement, this Court will not bring here by certiorari unless it be necessary to reconcile decisions of circuit courts of appeal on the same patent. We therefore find ourselves mistaken in assuming that an important issue of general patent law under Sec. 4916, Rev. Stat. (Comp. Stat. Sec. 9461, 7 Fed. Stat. Anno. 2nd ed. p. 211), is here involved. The result is that an order must be entered dismissing the writ of certiorari as improvidently granted, at the costs of the petitioner. Layne & B. Corp. vs. Western Well Works, 261 U. S. 387, 67 L. ed. 712, 43 Sup. Ct. Rep. 422; Furness, W. & Co. vs. Yang-Tsze Ins. Asso., 242 U. S. 430, 61 L. ed. 409, 37 Sup. Ct. Rep. 141; United States vs. Rimer, 220 U. S. 547, 55 L. ed. 578, 31 Sup. Ct. Rep. 596."

Magnum Import Co. vs. Coty, 262 U. S. 159, 163:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

There is no conflict of decisions. The petitioners here are involved in two other suits in the second and third Circuits on the Pott patent in suit here against other tools and against defendants other than this respondent.

The Official Gazette of the United States Patent Office published the following notices to the public upon the

receipt of notice thereof under the provisions of Title 35 U. S. C. 70, Sec. 4921 Rev. Stat. (as amended August 1, 1946)*:

Volume 622 at page 315, published May 10, 1949:

> "2,012,916 R. H. Pott, Impact Tool; 2,143,173 E. H. Shaff, Rotary Driving Tool, filed March 30, 1949, D. C., S. D. N. Y., Doc. 49/570, Chicago Pneumatic Tool Co. vs. Ingersoll-Rand Co. et al";

Volume 632 at page 641, published March 21, 1950:

> "2,012,916 R. H. Pott Impact Tool; 2,143,173 E. H. Shaff, Rotary Driving Tool; 2,220,711, C. E. Fitch, Impact tool, filed Oct. 27, 1949, D. C. Del. (Wilmington), Doc. 1274, Ingersoll-Rand Co. et al. vs. Independent Pneumatic Tool Co."

These suits ** have not been dismissed and until such time as petitioners succeed in obtaining a conflict in a decision in either of these cases with the concurrent decisions reached by the lower courts in the instant case certiorari should not be granted.

Petitioners cite *Crest Specialty vs. Trager,* 341 U. S. 912 and *Great A. & P. Tea Co. vs. Supermarket,* 340 U. S. 147 as precedent in urging a disregard of the orderly rule of not certifying up a final patent decision based upon concurrent decisions of the lower courts. The singularity of petitioners' citation is that this Court issued the writ in the *Crest Specialty vs. Trager* case to apply, in a per curiam decision, the law of the *A. & P.* case which the lower courts in the Seventh Circuit had not followed. The anomaly here is that petitioners seek to obtain a distinguishing modification of the law on patentable inven-

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* Copy of Statute included at end of this brief.

** This Court is requested to take judicial notice of the existence of the suits, *Brown vs. Piper,* 91 U. S. 37, 44; *Shapleigh vs. Mier,* 299 U. S. 468, 475.

tion as set down in the *A. & P.* case upon a set of inapposite facts which negative the effort. The lower courts in the instant case did not rely solely upon the *A. & P.* case in arriving at the conclusion that the claims were invalid.

ARGUMENT.

Petitioners state the controlling facts are undisputed (Petitioners' brief—top of page 5) but proceed to state a controversial premise having no support in the findings—that the patentee Pott was the first to propose a mechanism which would run the loose nut down on a bolt and after the nut is seated, produce a succession of rotary impact blows upon the nut to tighten it.

For many years, before Pott proposed his tool, there existed in widespread industrial use, portable, electrically driven automatic nut runners. It is undisputed that such tools are still manufactured and extensively used. Automatic nut runners operate on the principle of first running the nut down to seating by a power driven spindle which is coupled to the nut driving head by a spring closed camming clutch mechanism. Upon seating of the nut the rotation of the driving head socket connected to the nut is arrested, thus causing the clutch mechanism to cam open against the force of the spring as the driving spindle continues to rotate. (Finding 18, PA 36.) This rapid opening and closing of the clutch mechanism produces some hammering action. (DA* 19-20-21.) Transition from the first to the second mode of operation is automatic and automatically occurs at the proper time. Such sequence or "principle" of operation did not originate with Pott and is brought about automatically by the seating of the nut in the use of any prior art automatic nut runner.

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* DA is Appellee's Appendix.

The general mechanical organization of such prior art automatic wrenches or nut runners is shown by the Levedahl United States patent 1,684,633 (PA 196) and by the Decker patent 1,711,520 (PA 204). The Levedahl patent at page 3, column 2, lines 115-130 (PA 200) describes the hammering effect of the spring urged clutch mechanism to tighten the nut. Elimination of fatigue to the tool operator and protection of the mechanism were the purposes of these two patents. Confronted with such prior art it was expedient for Pott's solicitor not to designate his tool as an automatic nut runner. "Impact Tool" seemingly made a distinction and his objects are so directed (PA 162). Elimination of fatigue to the operator was an afterthought of Pott despite his testimony, for his application was completely silent on the point until two and a half years after he filed it. He then made a one sentence insertion on the matter of fatigue, not in his stated purposes, but toward the end of his specification (PA 163, top col. 2). Pott evolved no new principle of operation in automatic nut runners or wrenches. They always have operated first to run down the free turning nut to seating and upon seating of the nut then to continue to act on the nut automatically to tighten it. (Ramey DA 19, 20, 21, PA 125, Decker pat. DX 24, PA 206, col. 1, DA 203.)

Pott's stated objects and claims 3, 4, 9, 15 and 16 here in suit are directed broadly to an "Impact Tool" as his patent is entitled. (PA 162, trial court's Op. PA 6, par. 2; Appeals Court Op. R. 257.) To disclose a use of his alleged invention, in his patent drawings Pott showed an automatic nut runner with the mere substitution of a torsion spring for the positive driving spindle of the prior art nut runners. He termed such spring an energy accumulating means. He broadly claimed any and all such tools as "Impact Tools."

When the Patent Office permitted the Pott patent to issue without the citation of a single prior art patent showing rotary impact tools "wherein a resilient means is the sole driving connection between one of the parts and the prime mover" for the purpose of storing energy in a rotative manner to produce a rotary impact, the burden fell upon the public and this respondent to establish the true background of Pott's alleged pioneering invention of an impacting mechanism defined in broad functional terms not confined at all to a nut runner tool or impact wrench.*

In the prior art impacting tool field other inventors preceded Pott in disclosing the principle of storing or accumulating energy in a flexible driving shaft connecting a rotary hammer to a prime mover to impart to the rotary hammer an increase of velocity thereby increasing the force of the impact delivered by the hammer. The lower courts found this operating principle in the U. S. Nielsen patent (PA 230) and in the Scanlon Patent 1,671,489 (PA 235), Findings 14 and 15 (PA 31) and in the Weibull Patents (PA 240, 245, 257, 268).

The Swedish inventor Weibull disclosed in his United States and corresponding foreign patents the utilization of the operating principle of Pott as adapted to the design of a variety of mechanical arrangements, be the tool intended for axial movement for chisel hammering or for rotary movement of the tool head to effect an impacted turning movement of the work performing anvil of the tool. In doing so he eliminated shock to the motor and consequently to the operator (Findings 16 and 17, PA 33-35). The lower courts found that both claims 3 and 4 as asserted before them read upon the Weibull invention (Finding 28, PA 39).

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* Claim 11, not in suit, is the only one of the eighteen claims specifically referring to nut runner or wrench mechanisms.

Petitioners throughout their brief stress the sequence of operation of the Pott "Impact Tool" as not being disclosed in the Weibull patents and that Weibull did not disclose the use of his tools as nut runners. Behind such a position is the intent to prevent anyone from using any of the Weibull mechanisms as an automatic nut runner. No changes, which would fall outside of the Weibull disclosures, are necessary to use the Weibull impacting mechanisms as an impacting nut runner operating first, (a) to run the freely turning nut down to seating, and, (b) then automatically declutching and reengaging to deliver a succession of blows to the nut turning anvil thereby tightening the nut. Pott's claims are not limited to an anvil which is also a nut socket. Pott had the general mechanical organization of the automatic nut runners before him which included the automatic sequence of operation as well as the nut socket. *These features did not originate with Pott;—they are open to the public.*

Produced at the trial by respondent was a Weibull tool provided with Weibull camming impacting jaws between rotary hammer and anvil. The hammer is driven by an energy storing torsion spring as taught by the Weibull disclosures. "The model was fairly and correctly made by Mr. Brucker" (Trial Court's opinion PA 17). The sequence of operation of this tool is the sequence of operation now urged by petitioners upon this Court as being novel with Pott. *That sequence of operation is an incidental occurrence in the use of the Weibull tool to run down and tighten a nut.* The Court of Appeals stated:

> "We are impressed, too, by the testimony of Brucker as to the authenticity of the two Weibull models D X 42 and D X 46 which Brucker constructed and as to the disclosure in these models *that the Weibull hammer does rotate the anvil in any use of the tool which would involve resistance to anvil turning such as*

would be met with in the operation of running down a nut." (R. 261.) Emphasis ours.

After having arrived at the conclusion that Pott did no more than import Weibull into the portable automatic nut runner field without making or claiming patentable changes to do so, the Court applied the law of *Knapp vs. Morss,* 150 U. S. 221, 227, 228 and *Consolidated Roller Mill Co. vs. Walker,* 138 U. S. 124, 132, as authority for holding that the idea of transporting Weibull from the rotary impacting art to the automatic nut runner art broadly did not constitute invention (R. 262). Petitioners do not seek a redefining of the law of these cases.

It is apparent that petitioners' attempt at a distinguishing statement of a new principle of operation of the Pott tool (Br. pp. 5-7) finds no support in the record. Despite the statement of admission that "The controlling facts are undisputed," (Br. 5) the presented argument seeks to controvert the facts as established by the concurrent findings of the two courts below. A writ should not issue for such a purpose.

General Talking Pictures Corp. vs. Western Electric Co., 304 U. S. 175, 178—

> "Nor would the writ be granted to review the questions of anticipation and invention, for as to them there is no conflict between decisions of circuit courts of appeals."

citing *Keller vs. Adams-Campbell Co.* (*supra*) and other cases.

The Tool of the Pott Patent in Suit Did Not Meet With Commercial Success.

Too many defects appear in the story of the alleged commercial success of the tool disclosed in the Pott patent in suit to have it serve as a vehicle to carry the Pott claims to legality.

No tools were ever made commercially which incorporated the one way clutch mechanism and metal torsion spring disclosed in the Pott patent in suit (Finding 6, PA 27, Pott, DA 16, 17). Pott admitted he abandoned the wire torsion spring accumulator and developed his patented rubber accumulator tool which was reversible (DA 221, Pat. No. 2,049,273). This is the Pott tool petitioner Ingersoll-Rand Co. undertook to manufacture and sell in 1935 but it also became necessary to abandon it (Reynolds PA 63).

The tools made commercially by petitioner Ingersoll-Rand Co. do not operate on the Pott torsion spring hammer driving and energy storing principle (Finding 9, PA 28). These commercial tools are reversible and incorporate the impact mechanism inventions of others.

The Fitch patent 2,220,711 (DA 249) and the Shaff patent 2,143,173 (DA 239) admittedly relate to the commercial tool of petitioner Ingersoll-Rand Co. and originally were alleged in the complaint to be infringed but were dismissed with prejudice (Finding 9, PA 28). Pott reluctantly admitted that he participated financially in the purchase of these patents (DA 17, 18).

The commercially successful tool presented to the trial court for the purpose of showing success was not made in accordance with the Pott disclosure but was the brain child of other inventors (Finding 32, PA 40).

It becomes apparent that there is no foundation of fact in the record to support the petitioners' clever attempt to seize upon advertised statements of merit made by respondent with respect to respondent's accused tool, as statements of merit for the Pott tool, as disclosed in the Pott patent in suit. No such Pott tools were ever made and sold to amaze anyone. The success of the tools on the market, made by petitioner Ingersoll-Rand Co. and

by respondent incorporate impacting mechanisms devised and developed by inventors other than petitioner Pott (PA 174, DA 239, 249; Finding 32, PA 40). "The Pott tool did not achieve commercial success." (Trial Court's opinion PA 18.)

In view of the foregoing, petitioners' attempt to bolster Pott by seizing upon the fact that respondent did devise and develop a new form of impact type nut runner (Br. pp. 7, 8), operating on the principle of energy storing during the inertia restrainment of a rebound hammer (Finding 26, PA 39) to produce an interrupted, impacting torsion pendulum motion of the hammer, is wholly unjustified. The two mechanisms of respondent's tool in their integrated operations are completely foreign to anything attributable to Pott and constitute a patentable invention. (Wilhide *et al.* Pat. No. 2,533,703, PA 174.)

The Facts of Williams Co. vs. Shoe Machinery Co., 316 U. S. 364 Are Not Analogous to the Pott Patent in Suit.

As to the shoe lasting machine constituting the invention,—

> "* * * McFeely obtained the patent involved in this case for improvements of the lasting machine described in his earlier patent. The improvements embodied in the claims in suit had to do with a new combination of elements for clamping the last in the machine, a new combination of elements for the operation of wipers and tackers in fixed relation to each other and to the heel of the last, and a new combination of means for positioning the last vertically and automatically altering the position during the operation. A manual adjustment was a part of each of these combinations by which the heel clamping, the wiping and tacking and the vertically positioning mechanisms could be adjusted in advance for different sizes of shoes." (p. 366.)

Respondent had obtained machines from Germany—

"which were found by the courts below to be exact copies of the respondent's commercial machines made under the patent in suit."

The lower courts found that the patent was valid and this Court refused to overturn the concurrent findings below on the argued basis of anticipation by prior art patents stating that (p. 367)—

"These are findings of fact despite the petitioners' apparent contention to the contrary, and we will not disturb such concurrent findings where, as here, there is evidence to support them."—

citing *Continental Paper Bag Co. vs. Eastern Paper Bag Co.*, 210 U. S. 405, 416, 422, 52 L. ed. 1122, 1129, 28 S. Ct. 748; *Adamson vs. Gilliland,* 242 U. S. 350, 61 L. ed. 356, 37 S. Ct. 169. At page 370 this Court noted that:

"It is admitted, as it must be, that the petitioner is free to use the machine shown in the first McFeely patent which has expired, or any other automatic lasting and tacking machine which does not embody the three improvements covered by claims in suit."

Thus it appears that the shoe machine patent there in suit covered only certain clearly defined improvements used in conjunction with a prior art shoe machine and that the patent owner was not, as here, attempting to prevent the utilization of an operating principle found in expired patents.

No basis of support is to be found in the *Williams Co.* case for upholding ambiguous and vague claims such as Pott's claims 3 and 16, which the lower courts concurrently found did not meet the requirements of the basic patent statute (R. S. Sec. 4888).*

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* Statute printed at end of this brief.

SUMMARY.

The assertions throughout petitioners' brief as to the merits of the alleged invention of the Pott patent are founded upon false premises having no factual basis in the findings. No obvious error is pointed out by petitioners' brief.

Suits against other defendants and tools in other circuits are pending on the patent here in suit.

The concurrent decisions of the lower courts are consistent and are based upon the "controlling facts" as set forth in the undisputed findings and in the absence of a conflict of decisions of lower courts of different jurisdictions, the findings and the conclusions based thereon should not be disturbed.

No question of "great public interest" is presented by petitioners' efforts to obtain a review of the law on invention as stated in *Great A. & P. Tea Co. vs. Supermarket,* 340 U. S. 147. The petition is an attempt to get a broader, more liberal definition of invention merely to save a worthless patent. The lower courts did not rely solely upon the law of the *Great A. & P. Tea Co.* case in holding the claims of the Pott patent in suit void. Rather is it in the public interest not to have the patent stand as a bar to the use of impact tools, disclosed in expired patents, as automatic nut runners. Such right of use should remain in the public domain as now determined by the lower courts.

CONCLUSION.

As previously stated, this is an ordinary patent case in which no novel principle of law is involved, in which there is no conflict between courts of appeals regarding validity or scope of the patent in suit, and in which no question of public interest is presented. There being no

proper grounds set forth in support of the petition, the Petition for a Writ of Certiorari in this case should be denied.

Respectfully submitted,

ALBERT R. GOLRICK,
Counsel for Respondent.

THOMAS W. Y. CLARK,
Keyser Building,
Baltimore 2, Maryland,
Attorney for Respondent.

DARK PAGE BLEEDTHRU

APPENDIX.

35 U. S. C. Sec. 70; R. S. 4921.

* * * And it shall be the duty of the clerks of such courts within one month after the filing of any action, suit, or proceeding arising under the patent laws to give notice thereof in writing to the Commissioner of Patents, setting forth in order so far as known the names and addresses of the litigants, names of the inventors, and the designating number or numbers of the patent or patents upon which the action, suit, or proceeding has been brought, and in the event any other patent or patents be subsequently included in the action, suit, or proceeding by amendment, answer, cross bill, or other pleading, the clerk shall give like notice thereof to the Commissioner of Patents, and within one month after the decision is rendered or a judgment issued the clerk of the court shall give notice thereof to the Commissioner of Patents, and it shall be the duty of the Commissioner of Patents on receipt of such notice forthwith to indorse the same upon the file wrapper of the said patent or patents and to incorporate the same as a part of the contents of said file or file wrapper. (R. S. Sec. 4921; Mar. 3, 1897, c. 391, sec. 6, 29 Stat. 694; Feb. 18, 1922, c. 58, sec. 8, 42 Stat. 392; Aug. 1, 1946, c. 726, 60 Stat. 778)."

35 U. S. C. Sec. 33; R. S. Sec. 4888.

"Application for patent; description; specification and claim. Before any inventor or discoverer shall receive a patent for his invention or discovery he shall make application therefor, in writing, to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in the case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; *and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery.** The specification and claim shall be signed by the inventor. No plant patent shall be declared invalid on the ground of non-compliance with this section if the description is made as complete as is reasonably possible. (R. S. Sec. 4888; Mar. 3, 1915, c. 94, Sec. 1, 38 Stat. 958; May 23, 1930, c. 312, Sec. 2, 46 Stat. 376.)"

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* Italics ours.

In the

Supreme Court of the United States

October Term, 1951.

No. 587

INGERSOLL-RAND COMPANY and ROBERT H. SCOTT, HOLSCLAW BROTHERS, INC. and CHARLES H. HOLSCLAW, Trustee,

Petitioners,

vs.

BLACK & DECKER MANUFACTURING COMPANY,

Respondent.

PETITIONERS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

Frank B. Ober,
Attorney for Petitioners,
640 Mathieson Building,
Baltimore 2, Maryland.

Stephen H. Philbin,
Chester A. Asbe,
W. Blake Townsend,
Of Counsel for Petitioners.

March, 1952.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

INGERSOLL-RAND COMPANY and ROBERT H. POTT, HOLSCLAW BROTHERS, INC. and CHARLES H. HOLSCLAW, Trustee, *Petitioners,* *vs.* BLACK & DECKER MANUFACTURING COMPANY, *Respondent.*	No. 587

PETITIONERS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

Respondent's brief does not, we think, state the simple, undisputable and controlling facts concerning the Pott patent, the prior patents, and respondent's wrench.

1. The Pott patent, for the first time, described a wrench which would rotate a nut, without any hammering, until the nut's resistance to turning caused a series of rapid rotary impact hammer blows, produced by a motor driven spring, to drive the nut to final position.

This is the characteristic operation described in the Pott patent, and performed by all the "impact" wrenches in the case, including the "rubber spring" wrenches made and sold by Pott or Ingersoll-Rand from 1931 to 1936, the 1936 "wire spring and cam" wrenches made and sold by

Ingersoll-Rand to date, and the 1949 "wire spring and double lugs" wrench of respondent.

It is this characteristic operation which made the "impact" wrench a new and highly useful tool for industry, immeasurably reducing fatigue and danger to workmen, and causing respondent to add such a wrench to its line of "torque" (nut runner) wrenches.

Respondent's brief (p. 10) says that no Pott tools "were ever made commercially which incorporated the *one-way* clutch mechanism and *metal* torsion spring disclosed in the Pott patent in suit" (italics ours). Pott found that a *rubber* torsion spring was better than a *metal* torsion spring, because the rubber spring lasted longer, and it was *two-way* (reversible) (Pott, PA 112), and the *rubber* spring wrenches operated "very satisfactorily for the use they were intended" (Reynolds, PA 62).

Respondent's brief (p. 10) also says that the present Ingersoll-Rand "impact" wrenches "do not operate on the Pott torsion spring hammer driving and storing principle". The key word here is "torsion", because Ingersoll-Rand has a compression spring (instead of a torsion spring), to store energy and drive a hammer in the characteristic Pott operation, as an "impact" wrench.

2. The "prior art automatic wrenches or nut runners" referred to in respondent's brief (p. 6) as having the same principle of operation as the Pott patent are the "torque" type wrenches mentioned in petitioners' brief (pp. 5-7). They did not use a motor driven spring to accumulate energy, did not deliver a series of high momentum hammer blows, and did not relieve the operator of great fatigue and sudden dangerous shocks, as do the "impact" wrenches. The

only hammering the nut runners did was when the motor driven shaft was disengaged and then re-engaged, through clutch jaws, and the effects on both the nut and the operator holding the wrench were very different from those of the "impact" wrenches, as, indeed, would be expected because of the different mechanisms.

3. The tool of the Weibull patent (respondent's brief, pp. 7-9) has a spring driving hammer action, but it always has a substantial axial drive. Weibull can not do what the Pott wrench does, namely, continuously rotate, without hammering the nut, until its resistance to turning becomes too great. Weibull always hammers axially, which is not true of the "impact" wrenches.

4. Respondent's brief (p. 11) says "respondent did devise and develop a new form of impact type nut runner (Br. pp. 7, 8), operating on the principle of energy storing during the inertia restrainment of a rebound hammer (Finding 26, PA 39) to produce an interrupted, impacting torsion pendulum motion of the hammer". Before Pott, there was no "impact type nut runner", because the prior nut runners ("torque" wrenches) did not have any such "energy storing" or "torsion pendulum motion."

CONCLUSION

This is not a *Great A. & P. Tea* case. Here there was real "patentable invention", in changing the old, heavy, cumbersome, fatiguing and dangerous power driven "torque" wrenches, in use for many years, into the very different type of "impact" wrench, operating upon the wholly new principle of rotating a nut without hammering until the resistance of the nut to being rotated increases

and then automatically applying to the nut a rapid series of high velocity hammer blows to drive the nut to final position.

The Pott invention meets the requirements of the patent statutes and of this Court. The tough, highly competitive industrial tool industry, including respondent, which for many years had been dealing in wrenches and endeavoring to improve them, as evidenced by the many wrench patents of respondent and others, took the "impact" wrench invention of Pott. The only rights he, and others like him, have to such inventions are based on patents. This Court should correct the error into which the courts below fell, by granting the petition for writ of certiorari and deciding that Pott's patent is valid.

Respectfully submitted,

FRANK B. OBER,
Attorney for Petitioners,
640 Mathieson Building,
Baltimore 2, Maryland.

STEPHEN H. PHILBIN,
CHESTER A. ADEE,
C. BLAKE TOWNSEND,
Of Counsel for Petitioners.

March, 1952.